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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOTE BROTHERS GEAR & MACHINE CORPORATION

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDEPENDENT UNION OF GEAR WORKERS

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND MOTION TO REVERSE

The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit entered on July 24, 1940 (R. 1073–1074), setting aside and refusing enforcement of an order issued by the Board against Foote Brothers Gear & Machine Corporation.[1]

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[1] The decree (R. 1073–1074) was entered jointly in two distinct proceedings instituted under Section 10 (f) of the National Labor Relations Act for review of the Board's order. One of the proceedings was initiated by petition of

The Solicitor General, on behalf of the Board, also moves that the Court, in the event the writs are issued, shall at that time without oral argument reverse and set aside the decree, entered on July 24, 1940, and remand the cases to the court below with directions: (a) to review the Board's order solely upon the transcript of the record certified by the Board, including the stenographic report of the question-and-answer testimony upon which the Board's order was entered, printing such portions thereof as may be designated or stipulated by the parties, and (b) to exclude from consideration any narrative or abstract of such testimony.

OPINIONS BELOW

The majority opinion of the Circuit Court of Appeals (R. 1052–1071), and the dissenting opinion of Judge Treanor (R. 1071–1073), are not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 919–963) are reported in 14 N. L. R. B. 1045.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 24, 1940 (R. 1073–1074). An order

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Foote Brothers Gear & Machine Corporation (hereinafter referred to as the Employer) (R. 2–26), the other by petition of the Independent Union of Gear Workers (hereinafter referred to as the Independent) (transcript in No. 7252, pp. 1–12), a labor organization found by the Board to be company-dominated. In its answer to the Employer's petition, the Board requested enforcement of its order (R. 26–30).

extending the time within which to file a petition for writs of certiorari for ten days from October 24, 1940, was signed by a Justice of this Court (R. 1075). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, upon review of an order of the Board under Section 10 (f) of the National Labor Relations Act, the circuit court of appeals may consider as a part of the record a narrative summary of the testimony, prepared without the participation or consent of the Board, not certified by the Board, and different from the transcript of the testimony upon which the Board's findings and order were based.

2. Whether there was substantial evidence to support the Board's findings that Foote Brothers Gear & Machine Corporation—

(a) interfered with, restrained and coerced its employees in the exercise of their organizational rights, in violation of Section 8 (1) of the National Labor Relations Act;

(b) dominated, interfered with, and contributed support to a labor organization of its employees, in violation of Section 8 (2) of the Act;

(c) discriminatorily discharged two of its employees because of their union membership and activities, in violation of Section 8 (3); and

(d) refused to bargain collectively with a labor organization designated as bargaining representative by a majority of the employees in an appropriate bargaining unit, in violation of Section 8 (5).

3. Whether, if the second question be answered in the affirmative, the Board's order is appropriate, under the circumstances of this case, and entitled to enforcement in full.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are set forth in the Appendix, *infra,* pp. 41–43.

STATEMENT

The Board's findings and order.[2]—The board's findings [3] may be summarized briefly as follows.

During April of 1937 a majority of the Employer's office and clerical employees, a unit appropriate for collective-bargaining purposes (R. 942–944), joined the Stenographers, Typists, Book-

[2] The Board's findings of fact, conclusions of law, and order (R. 919–963) were issued after the customary procedure: charges (R. 31–35, 56–59), complaints (R. 38–41, 59–61, 55), answers (R. 52–54, 67–68, 75–77), hearing before a trial examiner (O. T. 1–3211), intermediate report (R. 763–800), exceptions thereto (R. 801–908), and oral argument (R. 975–1008). No question is raised as to these procedural steps. Nor is the jurisdiction of the Board questioned.

[3] The subsidiary findings and the evidence supporting them are discussed in detail under Point 2 of the Reasons for Granting the Writ, *infra,* pp. 15–17.

keepers & Assistants Union, No. 20074 (hereinafter called the S. T. B. A.) (R. 944–945)[4] and continued to designate it as their collective-bargaining agent during the entire month of May (R. 945, 936). On May 4, the S. T. B. A. notified the Employer by registered letter that it was the bargaining representative of such employees (R. 936).

On May 6, the Employer, through its vice-president, Barr, called together the representatives of its company-supported and dominated Employee Representation Plan (R. 927–929, 931).[5] Barr read to them a formal statement that the existing Plan was "legally entitled to recognition" if "supported by a majority", counselled them that there were "certain defects" in it and advised them to consult their attorney "as to the steps to take in perfecting your organization"; informally, however, he informed them that the Plan was not entitled to recognition (R. 931–933). No announcement whatever concerning the status of the Plan was made to the employees generally (R. 933). Two days later, the Independent Union of Gear Workers was inaugurated by Plan representatives,

[4] The Employer's officials, upon learning of the S. T. B. A.'s organizing efforts, systematically questioned the office employees with respect to their membership in and the activities of that organization (R. 930–931).

[5] This Plan had been formed in 1934, pursuant to suggestions by the Employer's predecessor, and had been operated since as little more than a phase of the Employer's personnel management (R. 927–929).

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who then carried on an intensive 3-day membership campaign, a substantial part of which was conducted on company time and property and with the knowledge of the company's supervisors (R. 933–935). A membership meeting was held, the Plan chairman was elected president, and the Plan representatives were elected a temporary committee to seek recognition from the Employer (R. 935, 937).

Meanwhile, a meeting arranged for May 14 with the S. T. B. A. was postponed by the Employer, "due to the absence of an official of the Company who must be consulted" (R. 937). On that very day, however, the Employer signed an agreement recognizing the Independent as the "exclusive bargaining agency of all the employees", including the office and clerical employees, despite the fact that not a single member of the office and clerical force had signed an application with the Independent (nor did the Employer believe that any had done so) and despite the fact that the S. T. B. A. represented a majority of the office and clerical employees (as the S. T. B. A. had offered to prove to the Employer) (R. 937–938, 944, 936–937). The Employer, after recognizing the Independent, then refused to recognize the S. T. B. A. as the bargaining representative of the office employees and refused to enter into negotiations with the S. T. B. A. looking toward a collective agreement (R. 938–939, 946). A further contract with the Independent, covering all the employees, and providing, among

other things, for a check-off of dues, was entered into 2 weeks later (R. 939–940, 946).

In June, the Independent attempted, for the first time, to organize the office employees; this campaign, like that in the shop, was carried on to a substantial extent in the presence of supervisory officials (R. 935, 940, 945). Early in the same month, the Employer discharged an office employee, Rakowski, one of the most active members of the S. T. B. A., because of his membership and activities in that organization (R. 948–952). In the following November, a shop employee, Matoska, just elected vice president of Amalgamated Association of Iron, Steel & Tin Workers of North America, Lodge No. 2048 (hereinafter called the Amalgamated), was discharged because of his membership and activities in that organization (R. 952–956).

The Board concluded that the Employer had dominated and interfered with the formation and administration of the Independent and contributed support to it in violation of Section 8 (2) of the Act; had discriminated in regard to the hire and tenure of Rakowski and Matoska and thereby discouraged membership in a labor organization, in violation of Section 8 (3); and had refused to bargain collectively with the S. T. B. A. as the exclusive representative of all of its office employees, an appropriate unit, in violation of Section 8 (5); and that these acts, as well as the questioning of office employees regarding S. T. B. A. membership and activities, amounted to interference, restraint and

coercion prohibited by Section 8 (1) (R. 931, 960–961). The Board, accordingly, ordered the Employer to cease and desist from these unfair labor practices, and from giving effect to its contracts with the Independent, to withdraw recognition from and disestablish the Independent, to refund all dues deducted from the employees' wages, and to offer Rakowski and Matoska reinstatement with back pay (R. 961–963).

Proceedings in the Circuit Court of Appeals.— The Employer and the Independent filed separate petitions in the court below to review and set aside the Board's order (R. 2–26; transcript in No. 7252, pp. 1–12). The Board answered (R. 26–31), requesting full enforcement of its order against the Employer and certifying the transcript of the entire record in the proceeding, as provided in Section 10 (e) and (f) of the Act. Thereafter, the court, on the Employer's motion (R. 1027–1029, 1033–1034), and over the objections of the Board (R. 1030–1032), entered the following order (R. 1019):[6]

> On petition of counsel for petitioner, it is ordered that leave be, and it is hereby, granted: to petitioner to print as a part of the record in this Court its prepared narrative of the evidence in lieu of printing the question and answer transcript of the

[6] This order appears to have been a special departure from the then applicable rules of the Seventh Circuit governing Board cases. See Rules 9, 21, Sections 1, 2, and Rule 37b, Section 3.

> hearings herein; to respondent, if it deems the said narrative deficient in any instances, to correct such believed insufficiencies by printing in such instances as an appendix to its brief the questions and answers; * * *

The Employer, pursuant to this order, filed two printed volumes, captioned "Transcript of Record," which consisted of its narrative or abstract in lieu of the testimony, compiled without a single cross-reference to the verbatim transcript.[7] This narrative had been prepared by counsel for the Employer, without notice to or participation or approval by, the Board and had been handed to the Board during *oral argument* without ever having been received in evidence at the hearing (R. 995). The Board then made two separate motions: It moved to exclude the narrative summary from consideration as part of the record before the court (R. 1036–1045), and it moved for an order directing (a) that the Employer and the Board, respectively, designate, print, and file, as appendices to their briefs, such portions of the transcript, including such portions of the testimony in question and answer form, as they desired the court to read (in accordance with the rules of the court, effective November 10, 1939); or, in the al-

[7] The numbers in the margin of the narrative do not refer to the typewritten transcript of the entire record filed with the court pursuant to Section 10 (e) and (f). We are not advised and do not know what they purport to represent.

ternative, (b) that the Employer print and file the transcript of the entire record, including the testimony in question and answer form as it appears in said transcript; or, in the alternative, (c) that the Board be granted leave to print and file said transcript of the entire record at its own expense (R. 1034–1036). The court denied both these motions (R. 1048–1049). The briefs filed by the Employer and the Independent cited the narrative summary of the record prepared ex parte by their own counsel; the brief filed by the Board cited the original verbatim transcript. On July 24, 1940, the court entered its decision and handed down its opinion, wherein it quoted at length from the narrative summary prepared ex parte by counsel for the Employer and the Independent (R. 1052–1073). On the same day the court entered an order (R. 1049–1050) denying the Board's motion, renewed at oral argument, to exclude the narrative from consideration as part of the record.

The court's disposition of the case.—The majority of the court set aside, as unsupported by substantial evidence, the findings as to the Independent (R. 1061, 1063–1064), as to interference, restraint, and coercion through questioning of S. T. B. A. members (R. 1063), and as to Rakowski and Matoska (R. 1064, 1069); did not mention or discuss the finding of refusal to bargain with S. T. B. A.; and set aside the Board's order in its entirety (R. 1071). Judge Treanor, dissenting, expressed the view that the findings were supported by sub-

stantial evidence and that the order should be enforced except for the requirement that the checked-off dues be refunded (R. 1073).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In considering as a part of the record a narrative of the testimony prepared by counsel for the Employer without the participation or consent of the Board, not certified by the Board, and different from the transcript of the testimony upon which the Board's findings and order were based.

2. In failing to hold that the following findings of the Board are supported by substantial evidence:

(a) That the employer dominated and interfered with the formation and administration of the Independent and contributed support to that organization;

(b) That the Employer interfered with, restrained, and coerced its employees in the exercise of their organizational rights by questioning employees regarding S. T. B. A. membership and activities;

(c) That the Employer discharged Rakowski and Matoska because of their union membership and activity;

(d) That the Employer refused to bargain collectively with the S. T. B. A. as the representative of its employees in an appropriate bargaining unit.

3. In setting aside and refusing to enforce the Board's order in full.

REASONS FOR GRANTING THE WRITS

I

The Circuit Court of Appeals in this case reviewed the order of the Board upon a narrative record, prepared without notice to, or participation or approval by the Board, and differing[8] from the transcript upon which the findings and order of the Board were based. The Employer was granted leave to print this narrative "as part of the record in this Court." True, the Board was granted leave, "if it deems such narrative deficient in any instances to correct such believed insufficiencies by printing in such instances as an appendix to its brief the questions and answers." But the narrow scope of this grant was quickly demonstrated when the court denied the Board's motion to strike the narrative and the Board's further motion to print and file, at its own expense, a verbatim transcript of the entire record. Thus the court not only refused to accept as a *substitute* for the narrative an accurate transcript of the entire record, printed at the Board's expense, but also refused to authorize the Board to print and file such a complete transcript as a *supplement* to the narrative. And, to climax this action, the court in its opinion quotes at length

[8] The following differences are cited as examples (R. refers to the narrative; O. T. refers to the transcript of the entire record filed with the court pursuant to Section 10 (e) and (f)): R. 182, O. T. 556; R. 185, O. T. 584; R. 573, O. T. 2839.

from the narrative, cited in the briefs for the Employer and the Independent, and, so far as appears, ignores the complete, typewritten transcript filed with the court pursuant to Section 10 (e) and (f), and cited in the Board's brief. The result of using the narrative and ignoring the typewritten transcript, if that, as appears, be the fact, was to render substantially useless the brief submitted by the Board since the major issue in the case was the sufficiency of the evidence. It is our contention that no such action is authorized under the provisions of the Act or under the usual and accepted course of judicial procedure.

1. The procedure under which an order of the Board may be reviewed and either enforced, modified, or set aside by a circuit court of appeals is described in subsections (c), (e), and (f) of Section 10 of the Act. Subsection (c) provides that "The testimony taken by such member, agent or agency of the Board shall be reduced to writing and filed with the Board. * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order * * *." Subsection (e) provides that, when it petitions for enforcement of its order, the Board "shall certify and file in the court a *transcript of the entire record* in the proceeding, including the pleadings and testimony upon which such

order was entered and the findings and order of the Board" and that the court shall have power "to make and enter *upon the pleadings, testimony, and proceedings set forth in such transcript* a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." (Italics supplied.) Subsection (f), governing the procedure whereby a person agrieved by a final order of the Board may petition for review, provides that the petitioner shall file a similar transcript, certified by the Board, and that, upon such filing, "the court shall proceed in the same manner as in the case of an application by the Board under subsection (e)".

Under these provisions, as this Court has stated, "The case must be heard on the record as certified by the Board." *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250. But, we submit, the record certified by the Board was not the record upon which the Seventh Circuit insisted upon hearing the case at hand. The ex parte narrative filed as part of the record, and quoted in the court's opinion, was neither the transcript of the testimony as "reduced to writing and filed with the Board" and "upon which such order [of the Board] was entered" nor was it any "part" of such transcript.

Our position is confirmed by the uniform practice under the Act. Neither in this Court, nor in any other circuit court of appeals, has an order of

the Board ever been reviewed upon a narrative, let alone an ex parte narrative, of the testimony. The applicable court rules in all of the circuits, including the Seventh,[9] omit any specific mention of a narrative as a basis for reviewing orders of the Board. And, in the Fourth Circuit, the position has been taken that the provisions of the Act, quoted above, preclude the narration of the testimony.[10]

2. The procedure adopted by the Seventh Circuit, in any event, departs from the practice under the Rules of Civil Procedure.

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[9] The present rules governing Board cases in the Seventh Circuit, adopted November 10, 1939, provide for an appendix system of printing the record and appear, clearly, to contemplate the question and answer, not the narrative, form of record. Rule 35, Section 4. The ex parte narrative form of record filed in this case, *supra*, p. 8, n. 6, as well as in the *New York Handkerchief* case, *infra*, p. 19, n. 16, was allowed in departure from the applicable rules of the Seventh Circuit.

[10] Senior Circuit Judge Parker, in *National Labor Relations Board* v. *Wallace Mfg. Co.*, 95 F. (2d) 818, denied a request by counsel for the respondent-employer to print the "entire testimony in narrative form." He stated: "* * * we are required by statute to hear Labor Board cases on the record made before the Board and there is no provision for narrating the record." His correspondence on this issue is set forth in the Record in the present case, at pp. 1042–1045.

Paragraph 7 of the special rules for Board cases in the Fourth Circuit, issued January 21, 1938, and initially set forth in a letter from Judge Parker to the clerk of that court (see R. 1042–1043), reads: "7. The testimony should not be narrated but should be printed exactly as it appears in the typewritten record; * * *." The present rules likewise appear to forbid narration of the record. See Rule 10, Secs. 1, 2, 3, 4, and 5, C. C. A. 4th.

Subsection (c) of Rule 75, 308 U. S. 645, 753–754, provides that "A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof." It is plain that subsection (c), together with (e),[11] contemplates the *substitution* of evidence in question-and-answer form so that only a single printed record shall be before the appellate court. In contrast, the unique procedure here adopted by the Seventh Circuit denied to the Board leave to *substitute* testimony in question-and-answer form for any part of the narrative. The grant of leave to correct believed insufficiencies in the narrative, by printing the questions and answers as an appendix to its brief, ensured at best the existence before the appellate court of two differing printed records in addition to the complete typewritten transcript.[12]

While the Rules of Civil Procedure, it is true, have not been made expressly applicable to pro-

[11] Subsection (e) provides that "For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs * * * and costs may be imposed upon offending attorneys or parties."

[12] Even that questionable privilege was restricted so as to deny to the Board an opportunity to supplement all of the narrative, which was unsatisfactory to the Board in its entirety.

ceedings under Section 10 (e) and (f) of the Act (Rule 81 (a) (5), 308 U. S. 645, 763), they do require that proceedings to review and enforce orders of the Board shall conform to them, so far as applicable, in respects not covered by the Act. See Rules 75, 81 (a) (2), (3), (5), (7). Compare Rule 8 of this Court, 306 U. S. 690–691. Accord: *Moore's Federal Practice,* c. 81, pp. 3425–3426. Rule 75 (c) is plainly applicable and, therefore, unless Section 10 (e) and (f) covers the form of the record, should have been applied in the case at hand.

Every indication in the Act points to the necessity that the question and answer form of transcript should be used (*supra,* pp. 13–15). It follows that the Seventh Circuit either has violated Section 10 (e) and (f) of the Act (see pp. 13–15, *supra*) or it has violated Rule 75 (c) and (e).[13]

3. The review of an order of the Board upon a narrative of the evidence, even one not drawn up ex parte, would substantially impair the ability of the Board efficiently to administer the Act. The disadvantages of a narrative record have frequently been recognized. See Note of the Advisory Committee on the Rules of Civil Procedure

[13] Even the practice under the federal equity rules, which required a narrative record, never authorized the filing of two differing printed records in an appellate court. Only a single, agreed, narrative form record was contemplated. Rule 75 (b), 226 U. S., Appendix 23; *Barber Asphalt Co.* v. *Standard Co.*, 275 U. S. 372.

(Rule 75), and authorities there cited.[14] And the difficulties of preparing an adequate narrative are even more serious in Board cases—which turn upon questions of motive, the genuine character of purported bargaining, and the like. See *e. g., National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318. The Board's own experience has demonstrated that the formulation of an adequate narrative of the testimony imposes a burden on counsel out of all proportion to the supposed advantage of the reviewing court; its only attempt to agree upon a narrative was abandoned after five months of

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[14] "This rule does not require the narrative form of record nor does it forbid its use. It allows a party to offer a narrative statement and permits his adversary to reject it and substitute question and answer form. The narrative form of testimony has been adversely criticized by the bar, by a considerable section of the bench, and by commentators. * * *

"Of the forty-two or forty-three states which do not require the narrative form of record, the division is about equal between (1) those which require that a transcript of the entire evidence, as taken by the stenographer, be inserted in the record on appeal so far as it relates to the errors relied upon; * * * and (2) those which permit the full stenographic transcript of relevant evidence to be used in the record on appeal at the option of one of the parties or the court; * * *."

laborious effort.[15] Should the narrative form of record be allowed in other cases, as it threatens to be,[16] the adequate enforcement of the Act in the circuits adopting such practice would be seriously hampered.

II

The testimony upon which the Board's subsidiary findings of fact are based is substantial and, in considerable part, uncontradicted. And the subsidiary findings, together with the inferences reasonably to be drawn from them, furnish ample support for the Board's order. But the majority of the Circuit Court of Appeals for the Seventh Circuit, by continuing to apply the technique of review described in our petition in the *Link-Belt* cases (Nos. 235 and 236, certiorari granted on October 14, 1940), denied enforcement to every provision of the order of the Board.

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[15] The attempt was made in *International Harvester Co.* v. *National Labor Relations Board* (C. C. A. 7th), a case eventually settled prior to final hearing.

[16] In *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, a case decided by the Circuit Court of Appeals for the Seventh Circuit on July 11, 1940, the employer-petitioner printed in the appendix to its brief, in lieu of the "parts of the record" provided for by the rules of the court (Rule 35, Section 4), a narrative of portions of the testimony. The court denied the Board's motion to strike the narrative "from the record." In *National Labor Relations Board* v. *Swift & Co.*, a case now pending in the Eighth Circuit, the employer-respondent, over the Board's objection, has submitted, with its brief, a narrative of the testimony. The Board has not been advised whether the court has permitted this document to be filed.

The majority in its opinion elaborates upon its "duty of examining the evidence" and states that "an examination of the evidence necessitates an analysis which to a certain extent is a weighing of such evidence" and which "involves the tedious study of testimony and witnesses' qualifications and biases, etc." (R. 1067). It then proceeds to indulge this concept of its duty by failing to mention major findings of the Board, by omitting important evidence supporting other findings, and by treating certain lines of evidence, contrary to testimony which the Board found persuasive, as if such evidence stood undisputed.

In short, we submit, the Seventh Circuit in this case, just as in the *Link-Belt* cases, has assumed to exercise a scope of review greatly in excess of that sanctioned by the Act and the decisions of this Court. Section 10 (e) and (f) of the Act; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318.

There follows a review of the Board's findings of fact, with citations to the supporting evidence,[17] and of the disposition of these findings in the Circuit Court of Appeals.

1. The Board based its ultimate findings—that the Employer (1) refused to bargain collectively with the S. T. B. A., the duly selected bargaining

[17] The citations to the evidence refer to the typewritten transcript of the entire record (O. T.) which has been certified to this Court.

representative of the office and clerical employees, an appropriate unit, and (2) dominated and interfered with the formation and administration of the Independent, and contributed support to that organization — upon the following underlying findings:

(a) In April of 1937, shortly after this Court upheld the constitutionality of the Act, the S. T. B. A. commenced to organize the office and clerical employees of the Employer, and continued its efforts through the greater part of that month (R. 930, 944; O. T. 54–55, Bd. Exh. 5). The Employer's officials, upon learning of this activity, systematically questioned the employees in that department concerning their union membership and the activities of the S. T. B. A. (R. 930–931; O. T. 1078–1084, 2829–2830, 2597, 2839, 711–712, 747–748, 1210–1211, 1281–1283, 2354–2355, 2633–2634).[18]

(b) During April of 1937, thirty-three office and clerical employees signed application cards designating the S. T. B. A. their representative for the purpose of collective bargaining with the Employer (R. 944; Bd. Exhs. 5 and 11, R. 646–647). These thirty-three, who constituted a majority of the employees in an appropriate collective-bargaining unit, continued to designate the S. T. B. A. as their

[18] The Board found that by this interrogation, under the circumstances, the Employer "interfered with, restrained, and coerced its employees in the exercise of their organizational rights, in violation of Section 8 (1) of the Act" (R. 930–931, 960).

bargaining representative throughout the entire month of May 1937 (R. 942–945, 960; O. T. 173, 50, 36, 40, 97–98, 140, Bd. Exhs. 5 and 11, R. 646).

(c) On May 4, 1937, the S. T. B. A., by registered letter, informed the Employer that the S. T. B. A. had been designated as collective bargaining representative by a majority of the office and clerical workers, and requested a meeting for the purpose of bargaining collectively with respect to the wages, hours, and other working conditions of such employees (R. 936, 945; O. T. 101–104, Bd. Exh. 7, R. 635–636). The Employer replied to this letter on May 5, 1937, suggesting that a meeting be held on May 7, 1937; this date proved unsatisfactory, and the meeting was held on May 10, 1937 (R. 936, 945; O. T. 105–109, Bd. Exh. 6, R. 634).

(d) Meanwhile, on May 6, 1937, Barr, the Employer's vice president, summoned to the office of its president a Committee representing its Employee Representation Plan (R. 931; O. T. 1101, 2551). This Plan had been formed in 1934, pursuant to suggestions by the Employer's predecessor, and had operated since as little more than a phase of the Employer's personnel management, supported and maintained by the Employer (R. 927–929; O. T. 547–551, 554, 2837, 754, 757, 2681–2682, 2551–2552, 1101–1103); it was characterized by elections and Committee meetings on company time and property (the Plan's governing body held its meetings only in the office of the Employer's

president or vice president), by the absence of any dues or other payments by its members, by only a single membership meeting in its history, by the failure ever to enter into any collective agreement with the Employer concerning wages, hours, or other conditions of employment, and by the apparent absence of any attempt to obtain such an agreement (R. 928–929; O. T. 550–551, 556, 622, 633, 762).

(e) Barr read to the Plan Committee, at this meeting on M y 6, 1937, a formal statement assuring them that "your present Employee Organization is legally entitled to recognition by us under the National Labor Relations Act if it is supported by a majority of the employees involved," counseling them that "there are certain defects in your manner of operation, and in your articles of association, that might operate against your best interests in the event of challenge," and advising them "to seek legal advice from a competent lawyer of your own choosing * * * as to the steps to take in perfecting your organization" (R. 931–932; O. T. 1101–1103, 2551–2552, Resp. Exh. 3, R. 672–673). Informally, however, Barr informed the representatives that the Plan, which he characterized as a "company union," was in fact unlawful and not entitled to recognition (R. 932–933; O. T. 1101, 1103, 2279). So far as appears, the Employer made no announcement to the employees generally with respect to the status of

the Plan; and Barr's formal statement, seemingly intended for employee consumption, was in fact given no general publicity in the plant either by the Employer or by the Plan shop committee (R. 933). Two days later, on May 8, 1937, five of the Plan representatives, together with the Plan chairman and a friend of his, consulted an attorney for advice in forming an unaffiliated labor organization, drafted a constitution, and initiated the Independent (R. 933; O. T. 1111–1113, 1149, 2282, Bd. Exh. 12). The Independent was structurally similar to the Plan and, like the Plan, was an "inside" organization (R. 933, 942; Bd. Exh. 12). The Board found (R. 933–934) that Barr's activity "under the circumstances was an invitation and instruction to the individual members to establish and carry on through a new 'inside' labor organization, as in fact they did." The Plan chairman and representatives, whom Barr had called into the president's office on May 6th, performed (with one other employee) all of the work of soliciting memberships in the new organization (O. T. 561, 1094, 1095, 1114–1116, 1740, 1460); and later, the Plan chairman was elected president of the Independent and the Plan representatives were selected as a committee to seek recognition from the Employer (R. 934–935; O. T. 586–587, 1125, 1385–1386, 1397–1398).

(f) In the space of three days, May 10, 11 and 12, the six Plan representatives, together with Plan Chairman Egner and his friend, acting to a sub-

stantial extent on company time and property (R. 934–935; O. T. 572–580, 765–766, 947–948, 1121–1123, 1287–1290, 1311–1321, 1441–1442, 2276–2277, 2479–2480), secured the signatures of more than 200 of the approximately 300 shop employees as members of the Independent (R. 934; O. T. 1114–1116, 1740, 561, 1462–1463, Int. Exh. 5A). From the intensive character of this campaign, among other evidence, the Board inferred that the solicitation was accomplished "with the knowledge and tacit permission of the respondent's supervisors" (R. 934).

(g) Meanwhile, the meeting scheduled for May 10, 1937, between the Employer and the S. T. B. A., had been held; the S. T. B. A. asserted the fact that it was the representative of the majority of the office and clerical employees, offered to submit its application cards, for comparison with the Employer's pay roll, to a conciliator of the United States Labor Department, or to the Board, and submitted to the Employer a proposed contract; the Employer thereupon requested time to study the proposals, and the meeting was adjourned to May 14th (R. 936–937; O. T. 106–109, Bd. Exh. 8, R. 636–639).

(h) On May 13, 1937, the Employer, through its president, Fowler, postponed until May 17th the meeting arranged for May 14th, "due to the absence of an official of the Company who must be consulted" (R. 937; O. T. 116–117, Bd. Exh. 9, R. 640). On May 14th, the date of the cancelled

meeting with the S. T. B. A., the Independent submitted to the Employer a proposed "agreement", which recited that the Independent had proved its majority representation to the satisfaction of the Employer and that the Employer recognized the Independent as the "exclusive bargaining agency of all the employees" (R. 937; O. T. 1126, 1135, 2843, Bd. Exh. 13, R. 648). Fowler signed the agreement, on that same day, recognizing the Independent as the "exclusive bargaining agency of all the employees"—including the office and clerical employees—despite the fact that not a single member of the office or clerical force had signed an application with the Independent, as the Employer must have known, since its secretary had checked the Independent applications against its payroll, and despite the fact that the S. T. B. A. represented a majority of the office and clerical employees and had previously offered to prove it to the Employer (R. 937–938; O. T. 2824, Bd. Exh. 13, R. 648; O. T. 1475, Int. Exh. 5A; Bd. Exh. 11, R. 646–647). The "agreement" was then posted upon the plant bulletin board (R. 938; O. T. 590–591, 771). All of the negotiations consumed only 4 or 5 hours (R. 938, O. T. 2875–2878).[19] At no

[19] Fowler on receiving the "agreement" summoned Egner, who had been the Plan chairman, and asked for proof of the Independent's majority representation; Egner tendered the signed petitions, and Fowler turned them over to the Employer's secretary for comparison of the names with its pay roll while he, meanwhile, took the "agreement" to his attorneys for their approval (R. 937; O. T. 1133, 2870–2871, 2844,

time, prior to its recognition of the Independent, did the Employer in any manner inform the S. T. B. A. that another labor organization was claiming recognition as the exclusive bargaining representative of the office and clerical employees (R. 938).

(i) On May 17, 1937, at the postponed meeting with the S. T. B. A., the Employer, acting through its president and its attorney, informed the representatives of the S. T. B. A. that the Independent had been accorded recognition as the exclusive collective bargaining representative of all of the employees, including the office and clerical force, and stated that unless and until the Board made a "classification" of the office workers as a separate bargaining unit, the Employer had no power to recognize any labor organization for a particular group of its employees (R. 938–939; O. T. 2492–2493, 2538). The Employer handed the S. T. B. A. representatives a memorandum, setting forth its views with respect to the various pro-

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2705–2706, 2820, Int. Exh. 5A). After an immaterial change in the agreement, Fowler returned to his office, was informed that the Independent had a majority, proceeded to reach and "finally located" by long distance telephone the three absent directors (including the "official" whose absence had been the ground for postponing the S. T. B. A. conference), obtained their consent to his executing the agreement, obtained a similar consent from the remaining directors, and again summoned Egner (R. 937; O. T. 2820–2823, 2875–2878, 2982–2984). The secretary had informed Fowler that verifying the authenticity of the signatures on the petitions "would take several days," so a certificate of authenticity was prepared and signed by Egner (R. 938; O. T. 2822, Bd. Exh. 15, R. 649).

visions in the proposal submitted, previously, by the S. T. B. A.; but, pending the "classification" mentioned above, the Employer declined to negotiate further with the S. T. B. A. (R. 939; O. T. 117–118, 2492, 2538, Bd. Exh. 10, R. 641–645). The Board found (R. 946–947) that the Employer's "conduct was induced by a rejection of the collective bargaining principle."

(j) On May 28, 1937, the Employer and the Independent entered into a collective contract, without a fixed duration, and subject to termination on May 1st of any year upon one month's notice, which recognized the Independent as the exclusive bargaining representative of all the employees and provided, among other things, for a check-off of dues from the wages of each member of the Independent (R. 939–940; O. T. 1386–1387, Int. Exh. 2, R. 654–658).

(k) During June of 1937, the Independent began to solicit members among the office and clerical workers, and, in contrast to the persistent questioning of employees by the Employer's officials during the S. T. B. A. campaign (R. 930; p. 21, *supra*), the Independent was allowed to conduct this solicitation openly during working hours and in the presence of the Employer's supervisory officials (R. 935, 940; O. T. 1286–1290, 1297–1303, 1318–1321, 1944–1946, 1966–1967, 431–432, 1007–1008, 1475, Int. Exh. 4, 5A, 5B, Bd. Exh. 11, R. 646–647). On June 11, 1937, the Employer discharged Rakowski, one of

the most active members of the S. T. B. A. who had recruited 24 of the 33 S. T. B. A. members (R. 948–952; O. T. 1062–1064, 1185, 1186, Bd. Exh. 5). Coincident with the solicitation by the Independent during June many members withdrew from the S. T. B. A. (R. 940, 944–945; O. T. 428–429, 442, 2371, 2314–2316, 2301–2302, 2234–2236, Bd. Exh 5, Int. Exh. 5B). The Board found (R. 940) that the "facts occurring subsequent to May 13 show not only that the respondent continued to favor and support the Independent but demonstrate the effective use which the respondent made of its creature to destroy self-organization among its employees, especially among its office workers." [20]

2. The court disposed of each of the foregoing findings or groups of findings as follows:

(a) The court dismissed the Employer's persistent questioning of its office and clerical employees during the S. T. B. A. campaign with the observation that "mere inquiries were made" and rejected the Board's finding (R. 930–931, 960) that the persistent interrogation, under the circumstances, amounted to interference, restraint, or coercion (R. 1062–1063). There is no recognition in the opin-

[20] For the sake of brevity, we do not discuss the evidence supporting the Board's finding (R. 948–952) that Rakowski was discriminatorily discharged by the Employer because of his activities in the S. T. B. A. and its finding (R. 952–956) that, in November 1937, one Matoska, a shop employee, who had just been elected vice president of the Amalgamated, was discriminatorily discharged by the Employer because of his activities in the Associated. We contend, however, that both findings are fully supported by the evidence

ion that such interrogation is one of the most common, and effective, methods of employer interference in union affairs; and no significance was attached to the questioning as evidence of a discriminatory motive in discharging Rakowski, one of the most active S. T. B. A. workers, who was interrogated by the Employer's president (see R. 952–960).

(b)–(c) The court states that "during April 1937, the S. T. B. A. had been trying to organize the Employer's office employees" and barely hints at the fact, not controverted at the hearing, that the S. T. B. A. had a majority of the office and clerical employees (R. 1059). It approves as "reasonable and proper" the finding that the office and clerical employees throughout May of 1937 were an appropriate bargaining unit (R. 1070–1071), but it refers to this finding only at the end of its opinion and ignores entirely the finding that the Employer refused to bargain collectively with the S. T. B. A. (see pp. 34–35, *infra*).

(d) The opinion of the court does not mention the finding of the Board as to the company origin of the old Employees Representation Plan, though it hints at a spontaneous origin (R. 1057), and ignores the findings that the Plan used company time and premises, never held but one membership meeting, and never attempted to obtain a collective agreement (see pp. 22–23, *supra*). It dismissed from consideration this whole phase of the case on

the novel theory that the Employer's domination of its Representation Plan was not an unfair labor practice under the Act prior to the *Jones & Laughlin* decision (April 12, 1937) and on the erroneous assumption that the Employer shortly thereafter dissolved the Plan (R. 1061).

(e) The opinion contains not a single reference to the Board's finding (R. 933–934) that the Employer, on May 6th, through its vice-president, Barr, invited and instructed the Plan representatives to form an "inside" union; and its recital of the events on that date omits crucial facts which support that finding. Specifically, the opinion of the court omits to state (1) that Barr, in reading a formal statement, advised the Plan representatives to "perfect" their "present Employee Organization"; (2) that Barr accompanied this advice with the information that the Plan, which he characterized as a "company union", was in fact unlawful and not entitled to recognition; and (3) that no announcement terminating the Plan, or even advising that it be perfected, was ever made to the employees as a whole (see pp. 23–24, *supra*). The court's opinion thus obscures the essential bases of the Board's finding, namely, that the Employer advised the continuance, with merely formal changes, of a labor organization which it dominated, and which it ~~recognized as~~ illegal, and that the Employer discussed the future organization only with the representatives of the older domi-

nated organization. By relying upon a partial statement of the facts, the court characterized the Employer's actions as merely a refusal to "advise its employees" with respect to "future organization in the shop" and accepted as conclusive the testimony of the Plan chairman that the decision by the Plan representatives to form an "inside" union was based upon the known wishes of the workers in the plant (R. 1057–1058). The fact that the dominant group in the formation and promotion of the Independent was composed of the Plan chairman and representatives—the very group the Employer had chosen to advise—was disposed of simply with the observation that "It is natural for a man who is active in union affairs to continue such activities because of his liking for them." (R. 1063.)

(f) The court characterized the 3-day campaign, in which eight organizers signed up 210 of the 280 shop employees, as "more or less active campaigning" carried on "here and there, at off moments" (R. 1058). For the Board's inference (R. 934) that such a thorough canvassing of the plant must have been carried on with the supervisor's knowledge, the court substituted its own finding (R. 1061) that the company, "as nearly as was humanly possible, maintained a truly 'neutral' * * * policy." This conclusion is based on the court's unsupportable observation (R. 1061–1062) that it is "undisputed" that the S. T. B. A., the Amalga-

mated, and the Independent all solicited on company time, and that the foremen impartially tried to stop all such activity—a view of the record which ignores (1) the prompt questioning of office employees by high officials of the Employer in respect of the membership and activities of the S. T. B. A., a measure to which the Independent was never subjected, and (2) the fact that neither the S. T. B. A. nor the Amalgamated engaged in any such open, widespread, and intensive solicitation as did the Independent (*supra*, pp. 21–22, 24–25).

(g)–(h) The court, apparently, attached no significance to the haste with which the Employer accorded recognition to the Independent as bargaining representative of all of the employees, an act which the Employer relied upon to compel the office and clerical workers (a majority of whom had designated the S. T. B. A.) to deal through a labor organization which none of them had designated (pp. 25–27, *supra*). The fact that the Independent had no members among the office workers, as the Employer must have known, and that the S. T. B. A. represented a majority of them (pp. 21–22, 26, *supra*), are scarcely suggested in the opinion (R. 1071, 1059). The court, instead of stating these facts, remarked that the Independent's "majority" made it "the statutory duty of Employer to recognize it" (R. 1063), and that "the real issue

[raised by the Board's order] is the survival of the union which 75 percent of the employees organized and selected as their bargaining agency" (R. 1070). The inconsistency of the opinion is the more striking since the court expressly approved the Board's determination that the office and clerical employees constituted an appropriate bargaining unit, separate from those in the shop (R. 1070–1071).

(i) The Board's finding that the Employer refused to bargain collectively with the S. T. B. A.—a major issue in the case and the basis of a cease and desist provision of the order (R. 961)—was wholly ignored by the court. Indeed, the opinion indicates that the court was under the impression that no such issue was involved.[21] The court failed to mention the uncontested evidence of the S. T. B. A. majority among the office employees, stating merely (R. 1059) that "the S. T. B. A. had been

[21] The court said: "The Board made no order in respect to this finding [regarding the office bargaining unit]. We feel justified in expressing our views on this question, nevertheless, because of possible future activities of employees of this group" (R. 1071). Any such "future activities," if directed toward collective bargaining, however, were foreclosed by the court's denial of enforcement to any part of the Board's order, thus leaving the Employer free to continue to recognize the Independent and to continue to give effect to its contract with that organization covering all the employees, including the office and clerical force, and to continue its refusal to bargain collectively with any representative of such employees (pp. 7–8, *supra*).

trying to organize" them and that its agent "asserted" it had a majority, apparently attached no importance to the Employer's recognition of the Independent on May 14, after postponing its conference with the S. T. B. A. set for that very day (R. 1059–1060); omitted any reference to the Employer's express refusal to recognize the S. T. B. A. on May 17; and described as "counterproposals" the company's memorandum, handed to the S. T. B. A. after these acts had rendered bargaining an academic question (R. 1060).

(j)–(k) The steps taken by the Employer to consolidate the position of the dominated Independent, and thus destroy self-organization among its employees (see pp. 28–29, *supra*), were viewed by the court as persuasive evidence that the Independent was not company dominated—a view which ignores the entire evidence bearing upon the Employer's activities in connection with the initiation and recognition of the Independent.

We submit that the permissible bounds of review were transcended in this case, just as in the *Link-Belt* cases (Nos. 235 and 236, certiorari granted on October 14, 1940), and that effective enforcement of the Act in the Seventh Circuit is in substantial jeopardy.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, this petition for writs of certiorari

should be granted, and the decree entered on July 24, 1940, should be reversed without oral argument and the cases remanded to the court below with directions to proceed in accordance with the prayer in our motion.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,
Associate General Counsel,
National Labor Relations Board.

NOVEMBER 1940.

In the Supreme Court of the United States

OCTOBER TERM, 1940

NOS. ——, ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOTE BROTHERS GEAR & MACHINE CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDEPENDENT UNION OF GEAR WORKERS

MOTION TO DISPENSE WITH PRINTING OF THE TRANSCRIPT OF TESIMONY

The Solicitor General, on behalf of the National Labor Relations Board, prays that the Court shall consider the petition for writs of certiorari in the above-entitled cases, filed herewith, upon the typewritten transcript of the testimony, as certified and filed by the Board in the Circuit Court of Appeals, and shall dispense with the requirement of printing such transcript.

1. As shown in our petition (pp. 1–36, *supra*), the Circuit Court of Appeals for the Seventh Circuit, over the objection of the Board, granted

the motion of Foote Brothers Gear & Machine Corporation (hereinafter called the Employer) to print and file "as a part of the record" a narrative of the testimony, prepared ex parte by counsel for the Employer, not certified by the Board, and differing from the transcript upon which the Board's findings and order were based. The court then denied the Board's separate motions (a) to strike the narrative, and (b) to issue an order providing either for the printing of the verbatim transcript of the entire record (a typewritten transcript of which had been filed with the court pursuant to Section 10 (e) and (f)), by the Employer or by the Board, or for the designation and printing of portions of such transcript by both parties. Thus the Court not only refused to substitute for the ex parte narrative an accurate transcript of the entire testimony, printed at the Board's expense, but also refused to permit the Board to supplement the narrative with such a printed transcript. And the narrative was therefore the only *printed* "record" before the court.

2. In our petition (pp. 12–19, *supra*), the procedure thus adopted by the court is assigned as error and shown to violate the provisions of the National Labor Relations Act, to depart from the practice under both the Rules of Civil Procedure and the federal equity rules, and to impair the efficient administration of the Act. We are moving that the Court, in the event writs of certiorari

are issued, shall at that time set aside the decree and remand the cases to the court below with directions to consider them solely upon the entire verbatim record required by the Act (i. e. the transcript of the proceedings, including the stenographic report of the question-and-answer testimony upon which the Board's order was entered), printing such portions thereof as may be stipulated, and to exclude from consideration the employer's ex parte printed narrative of such testimony.

3. The record certified to this Court by the Circuit Court of Appeals consists of the following: (1) the typewritten transcript of the entire record as certified and filed by the Board in the court below, pursuant to Section 10 (e) and (f) of the Act; (2) a printed document in two volumes, captioned "Transcript of Record", which contains, in lieu of the testimony, the narrative mentioned above, together with the pleadings before the Board, the Board's findings of fact and order, and the order of the court below authorizing the filing of the narrative "as part of the record"; (3) a third volume containing other pertinent motions and orders in the court below, the majority opinion and the decree of the court below setting aside and refusing to enforce the Board's order, and the dissenting opinion of Judge Treanor; and (4) a volume containing the pleadings and a stipulation and order in the case initiated by the Independent Union of Gear Workers.

4. A disposition of the case in accordance with our motion would not require a detailed examination by this Court of the testimony, and, therefore, the printing of the verbatim transcript of testimony (consisting of 3,211 typewritten pages) would appear to be unnecessary at this time.

Under such a disposition, moreover, the Board would still face the possibility that, even if a printed transcript were available, the Seventh Circuit would apply its present rules calling for an appendix system of printing the testimony. Rule 35, C. C. A. 7th. Until our motion is acted upon, therefore, the Board cannot be sure that the substantial expense of printing the transcript of the testimony will not be duplicated.

In the event the Court issues the writs, yet denies our motion, the Board stands ready to print and file forthwith a transcript of the testimony in question-and-answer form.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,
Associate General Counsel,
National Labor Relations Board.

NOVEMBER 1940.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*) are as follows:

SEC. 10. * * *

* * * * *

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in

question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order

complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (c), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1949

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 547

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOTE BROTHERS GEAR & MACHINE CORPORATION

No. 548

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDEPENDENT UNION OF GEAR WORKERS

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND MOTION TO REVERSE

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Government desires to call to the attention of the Court a decision of the Circuit Court of Appeals for the Eighth Circuit, handed down subsequent to the filing of our petitions for writs of certiorari in the above-entitled cases. *National Labor Relations Board* v. *Swift & Co.*, decided Novem-

ber 20, 1940. In the *Swift* case the Court granted a motion of the Board to strike a narrative of evidence prepared and filed by the respondent company, upon the ground, among others, that the Act requires that orders of the Board be reviewed upon the testimony as it appears in the record certified by the Board. In this particular, the decision appears to be in direct conflict with that of the court below.

Since the *Swift* opinion is unreported, it is printed in full in the appendix attached hereto.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,
Associate General Counsel,
National Labor Relations Board.

NOVEMBER 1940.

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 474, Original.—November Term, A. D. 1940

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SWIFT AND COMPANY, A CORPORATION, RESPONDENT

ON PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[*November 20, 1940*]

Mr. Mortimer Kollender, Senior Attorney, National Labor Relations Board (Mr. Charles Fahy, General Counsel; Mr. Robert B. Watts, Associate General Counsel; Mr. Laurence A. Knapp, Assistant General Counsel; Mr. Richard C. Barrett and Mr. Thomas F. Wilson, Attorneys, National Labor Relations Board, were with him on the brief) for Petitioner.

Mr. D. L. Grannis and Mr. William N. Strack for Respondent.

Before SANBORN, WOODROUGH, and THOMAS, Circuit Judges.

WOODROUGH, Circuit Judge, delivered the opinion of the court.

This case comes before the court upon petition by the National Labor Relations Board for the en-

forcement of its order issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 et seq.). Respondent is an Illinois corporation, operating a plant at South St. Paul, Minnesota, where the Board found unfair labor practices occurred.

Upon charges filed by the United Packing House Workers Local Industrial Union #814, a labor organization, herein called the United, the Board through its regional director issued its complaint against respondent on July 5, 1938, alleging in addition to jurisdictional facts that the respondent had dominated and interfered with the formation and administration of Employees Security Association and its successor, Packing House Employees Union of South St. Paul Local #1, labor organizations, both sometimes referred to as the Association, and had contributed financial and other support thereto, and had urged, persuaded, and warned its employees against joining the United, in violation of Section 8 (1) and (2) of the Act. On July 18, 1938, respondent filed an answer denying the commission of unfair labor practices. Pursuant to notice, a hearing was held from August 8 to 11, 1938, at South St. Paul, Minnesota, before a trial examiner. Full opportunity to be heard, to examine and cross-examine witnesses and to adduce evidence on the issues was afforded. The trial examiner issued his intermediate report, to which exceptions were filed by respondent, and oral argument was had before the Board. On October 9, 1939, the Board issued its decision setting forth its findings of fact, conclusions of law and order.

Thereafter, on February 9, 1940, the Board caused notice to be served upon respondent that it would, unless cause to the contrary was shown, amend its decision and order by adding a ruling in effect striking out certain testimony which had been offered on behalf of the Board at the hearing before the examiner and by deleting a certain subsidiary finding included in paragraph III–B of the decision. The testimony stricken consisted of the records of Board decisions in other cases against the respondent herein, viz, Nos. C–355, C–484, and R–605, all decided May 20, 1938, and the matter deleted consisted of two sentences and accompanying footnotes as printed at page 13 of 15 N. L. R. B. No. 110.[1] After hearing, the Board made and entered the amendments proposed in the notice.

In its response to the petition of the Board herein the respondent prays this court to deny enforcement of the order.

As the decision, findings of fact, conclusions and order of the Board are published in full in 15 N. L. R. B. No. 110, it is unnecessary to repeat them here. The contentions of the respondent are that there is no evidence to support the subsidiary findings of the Board and they are contrary to the evidence; that such findings are argumentative and not true findings, and they do not support the ulti-

[1] Sentences deleted: "It may be noted, also, that the same pattern of procedure was followed by the respondent at its plants in Denver, Colorado, Evansville, Indiana, and National City, Illinois, where employee representation plans were dissolved with like results. It seems to us more than a coincidence that from several of such meetings came the organization of 'inside' unions which received the quick recognition of the respondent."

mate findings that respondent has engaged in unfair labor practices within the meaning of Section 8 (1) of the Act or Section 8 (2) thereof; that there is no evidence to support such findings; that the Board's amendment of its decision was improper, and that the order is contrary to law in that it is too broad.

The attacks upon the subsidiary findings are developed in the argument upon contentions that the Board has ignored important facts established by uncontradicted testimony; that it has found facts upon contradicted testimony, although its findings are contrary to undisputed testimony; that it has drawn inferences which are not only improper, but likewise in conflict with the uncontradicted testimony. To all of which careful consideration has been given in connection with examination of the extensive record. Such examination leaves no doubt that other and different inferences might have been drawn from the testimony than those drawn by the Board. It is true the Board has not undertaken to set forth in its findings any abstract or summary of all the evidence in the record. It has merely drawn from the whole evidence and presented as subsidiary findings the evidentiary facts upon which it has based its ultimate finding that specified provisions of the Act were violated. It was not incumbent upon the Board to recite all the evidence, or even all undisputed evidence, or the evidence from which inferences opposed to its own might have been drawn. It is hardly possible that any two examiners would express inferences of evidentiary facts drawn from an extended record in identical language. Here the subsidiary findings indicate the evidence from which they are

drawn clearly enough to enable the respondent and the court to make the necessary comparison with the record. The respondent has pointed out and argued those claimed to be unsupported or contrary to the evidence. But proceeding, step by step, through the subsidiary findings made by the Board, none has been found without the support of some substantial evidence in the record. The weight to be given the testimony of the witnesses was for the Board and not for the court.

The inquiry of the Board concerned the situation in which the workers of respondent had long been associated in an organization in which half of the members of its representative body had been chosen by the respondent. The active and directing heads of the organization had supervisory authority over some of the workmen. The respondent had posted in the plant its declaration to the workmen in writing that as the Supreme Court had construed the National Labor Relations Act, it was "not possible to continue the organization," and such was manifestly the fact. In that situation the requirements of the Act were that there be complete restoration to the workers who had been associated in the organization of full freedom to exercise their right of self-organization, *N. L. R. B.* v. *Newport News Shipbuilding Co.*, 308 U. S. 241, l. c. 250. The facts here found by the Board upon sufficient evidence fairly support the inference that such full freedom was not restored and that advantage was taken by the employer of the existing organization and of the authority of certain members of its Assembly which adhered to them by reason of their offices in that organization. The acts of assistance and interference on the part of re-

spondent in the organization of the new labor organization could not be judged in isolation by themselves alone. If that were possible, the holding would have to be that the acts did not amount to the domination or interference prohibited by the Act. But only a few days intervened between the respondent's posting its declaration of the impossibility of continuing the old organization and the completion of the new organization and the recognition thereof by the employer. The facts found by the Board upon substantial evidence sufficiently sustain its finding that there was a material degree of interference and domination on the part of the respondent in the formation and administration of the new labor organization.

The respondent insists that even if some order of disestablishment was justified, the present order goes too far, and by failing to specify the conduct that may be deemed a contempt, the order subjects respondent to wrongful restraint in the conduct of its business. The order imposes its prohibition substantially in the language of the statute and is concededly in the same form that has been used by the Board in a great number of cases decided by it, and the assertion in the brief of the Board that its orders in substantially the same form have been sustained by the Supreme Court in 17 cases and by the Circuit Court of Appeals in more than 50 others, is not specifically controverted. But it is argued that the attention of the several courts has not been particularly directed to the form of the orders in the cases referred to by the Board, and that where the form has been put directly in issue the weight of authority sustains respondent's contention against the scope of the order here. We

think the weight of authority sanctions the order in this case substantially in the language of the sections 8 (1) and 8 (2) of the Act. *Texas and New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240. The cases, *Swift and Co.* v. *United States,* 196 U. S. 375, and *New York, N. H. & H. R. R. Co.* v. *I. C. C.,* 200 U. S. 361, are not to the contrary. In the Circuit Court of Appeals, orders in the form used here are upheld in cases where the question of the extent of the prohibition was directly in issue and passed on by the courts. *National Labor Relations Board* v. *Remington Rand, Inc.,* 2 Cir., 94 F. 2d 862, 868; cert. den., 304 U. S. 576, 585.

The proceedings taken by the Board resulting in the amendment of its decision afford no sufficient ground for denial of its petition. It appears from colloquy between members of the Board and counsel at the oral argument before the Board, and from the decision as first promulgated, that the Board attributed some weight to the evidence in other cases before the Board in which Swift and Company was a party. But the notice to respondent of the proposed amendments gave respondent opportunity to be heard and it submitted its brief in opposition to the proposed action. The court can not assume that the Board failed to consider the effect of excluding the evidence which it excluded, or of deleting the subsidiary finding based on such evidence. The decision as amended is the Board's decision, and the findings included therein must be given the effect required by the statute.

The respondent has lodged with the clerk of the court its printed abstract of evidence purporting to contain the evidence in the record reduced to narrative form. The Board objects to the filing of such abstract, or consideration thereof by the court, and moves to strike it from the files on the following grounds: (1) It cannot be considered as part of the respondent's brief because respondent's brief previously filed contained practically the full number of pages allowed by our Rule 45, Section 5; (2) the Act requires that review be had upon the testimony and other proceedings as they appear in the record before the Board, certified by the Board. Section 10 (e), *N. L. R. B.* v. *Newport News Shipbuilding Co.*, 308 U. S. 241, loc. cit. 249–250; (3) the procedure of considering one party's narrative version of the evidence conflicts with our Rule 45, Section 2, "The case shall be heard upon such transcript (certified by the Board) * * * "; (4) "the narrative form of testimony has been criticized by the bar, by a considerable section of the bench and by commentators". Notes to Rules of Civil Procedure (printed in S. Doc. No. 101, 76 Cong. 1st Sess. at p. 290), the Narrative Record in Federal Equity Appeals (1929) 42 Harv. L. Rev. 483; (5) the Board not having agreed to the narrative of evidence may not be bound by it.

The motion to strike is sustained on the grounds of objection numbered 1, 2, 3 and 5, and no consideration has been given to the tendered abstract of evidence.

Enforcement of the order is directed.

U. S. GOVERNMENT PRINTING OFFICE: 1940

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 547

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOTE BROTHERS GEAR & MACHINE CORPORATION

No. 548

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDEPENDENT UNION OF GEAR WORKERS

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND MOTION TO REVERSE

SUPPLEMENTAL MEMORANDUM IN BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

The briefs filed by the Employer (Br. 8) and by the Independent (Br. 14), in opposition to our petition for writs of certiorari in the above-entitled cases, each make the contention that the Board stipulated with them that the Circuit Court of Ap-

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peals might consider, as part of the record, the Employer's narrative statement of the testimony. This contention, of course, goes to the heart of our argument as to the propriety of using the narrative.[1] This memorandum, therefore, is filed in order to inform the Court fully as to the circumstances bearing upon the meaning of the stipulation.

It is, and throughout these cases has been, the Board's understanding that the stipulation (R. 1051), and the order entered thereon (R. 1052), had as their sole purpose and objective the consolidation for hearing, upon one and the same record, of the case just arising upon the Independent's petition to review (in which the stipulation and order were made) with the case theretofore pending upon the Employer's petition to review. The stipulation, directed at consolidation of the records, cannot under the circumstances be thought to have settled the quite different question of what should constitute the record.

The Employer, on November 27, 1939, had moved the Circuit Court of Appeals (R. 1022–1023) in its case to require the Board to certify and file, *as part of the record before the Board,* the Employer's narrative of the testimony. The Board, in opposing (R. 1025–1026), had pointed out that the narrative was *not* part of the record before the Board

[1] The Board's second reason for granting the writs, i. e., that the Circuit Court of Appeals transcended the permissible bounds of review as to the facts, is not affected by this contention.

and hence could not be so certified under Section 10 (f) of the Act (see Bd. Pet. at p. 9). On December 7, 1940, the court had *denied* the Employer's motion (R. 1018). Thereafter, on December 15, 1939, the Employer further moved in its case (R. 1027–1029) for leave to print its narrative as part of the record, not before the Board, but before the Circuit Court of Appeals. Counsel for the Employer bottomed its motion exclusively upon the ground that the use of its narrative would save printing costs (R. 1028–1029). On January 18, 1940, despite the Board's objections (R. 1030–1032), the Circuit Court of Appeals granted the Employer's motion (R. 1019).

The only cause pending upon review, up to this point in the proceedings, was Case No. 7088 arising upon the petition of the Employer. And the Board had consistently and repeatedly advanced serious objections to the consideration of that case upon the Employer's narrative of the testimony. The next step was taken by the Independent, on March 9, 1940, when it filed its separate petition to review the Board's order, which was docketed, separately, as Case No. 7252.[2] On that same date, March 9, 1940, counsel for the Independent forwarded to the Board a copy of the petition for review together with a form of stipulation bearing only the title of the Independent's case, No. 7252 (see R. 1051). In his covering letter, set forth

[2] This petition appears in the Transcript of Record in No. 7252, pp. 1–12.

in the margin,[3] counsel for the Independent stated that the purpose of the stipulation was to have "the record in Foote Bros., case No. 7088, stand as the record in this case and to consolidate the cases for the oral argument." There were obvious, and proper, bases for such a stipulation.[4] The

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[3] The entire body of the letter, which is not of record but to which the Board believes it proper under the circumstances to refer, reads as follows:

"MARCH 9, 1940.

"In re: *Independent Union of Gear Workers* v. *National Labor Relations Board and Foote Bros. Gear and Machine Corporation, No. 7252*

"Honorable CHARLES FAHY,

"*General Counsel, National Labor Relations Board,*

"*Washington, D. C.*

"DEAR MR. FAHY: In order to save expense and to facilitate the matter, I enclose herewith a copy of the petition just filed, together with a stipulation, with a copy for your file, a copy for my file, and a copy for Foote Bros.' file, for the purpose of having the record in Foote Bros., case No. 7088, stand as the record in this case and to consolidated the cases for the oral argument.

"If this is not in a form which you wish please feel free to revise it.

"This is my second and last appeal to the Circuit Court of Appeals, I hope. I don't want you to get the impression that I am opposed to the general spirit and philosophy of the Act or what you in general are trying to do.

"Sincerely yours,

"BW:GE "[s] BENJAMIN WHAM.

"Enc."

[4] In the absence of such a stipulation, Section 10 (f) of the Act would have required the certification and filing, in Case No. 7252, of the identical record before the Board certified and filed, months before, in Case No. 7088; the two causes, moreover, would have proceeded to final hearing independently.

Board, accordingly, executed and returned the stipulation to counsel for the Independent promptly under date of March 11, 1940.

Thereafter, on March 19, 1940, the Board received from the Circuit Court of Appeals, in Case No. 7088 (pending on the Employer's petition for review), a document entitled "Transcript of Record" containing the Employer's narrative of the testimony (see Bd. Pet. at pp. 9–10). On April 25, 1940, the Board filed in Case No. 7088 its motion to strike the narrative and exclude it from consideration as any part of the record upon review and its motion that, as one of three alternative ways of making up an appropriate printed record, the Board be authorized to print, at its expense, the entire record before the Board certified to the court (R. 1036–1045; see Bd. Pet. at pp. 9–10). In its motion to strike, the Board renewed and amplified its "strenuous" (R. 1039) objections to considering the case upon a document not part of the record before the Board, and asserted that the Board had *never* agreed to such use of the narrative (R. 1037, 1039). The court denied both motions, on May 23, 1940, with leave to renew the motion to strike at final hearing (R. 1048–1049). The motion to strike was renewed in Case No. 7088 at final hearing and denied by an order entered in that case on July 24, 1940 (R. 1049). On the same date, the Court handed down its opinion (R. 1052–1073) and entered separate decrees (R. 1073, 1074) upon the merits.

The words of the stipulation upon which respondents rely are that "The record as certified * * * [in Case No. 7088] and the summary thereof shall stand as the record of the proceedings before said Board in this case" (R. 1051). These words, if given the construction here urged by the Independent (Br. 14) and by the Employer (Br. 8), would result in overturning the order of the Circuit Court of Appeals, entered on December 7, 1939 (R. 1018), sustaining the position of the Board that the narrative was *not* part of the record before the Board (pp. 2–3, *supra*). This is a most unlikely intention to impute to the parties. Normally, and under the circumstances here, the purpose and objective of such a stipulation would be solely to consolidate the cases and thus relieve all parties of the inconvenience and expense involved in making up a separate printed record (pp. 2, 4, n. 4, *supra*). The action of the Circuit Court of Appeals on May 23, 1940 (R. 1048–1049), also militates against the respondents' position. Despite the Employer's contention that the Board stipulated to the use of the narrative (R. 1046–1047), and despite the fact that it had entered an order upon the stipulation (R. 1052), the Circuit Court of Appeals granted the Board leave to renew, at final hearing, its motion to strike the narrative and thus indicated that it had construed the stipulation otherwise than in accordance with the claims of the Employer and the Independent.

The critical words, that the "record as certified * * * [in Case No. 7088] and the summary thereof shall stand as the record of the proceedings before said Board in this case" (R. 1051), should be construed to have no other meaning than that, having been handed physically to the Board at oral argument before it (R. 995), the summary was among the papers before the Board; not that the summary was by stipulation made a part of the record of the proceedings upon which the order of the Board was entered and on which the Circuit Court of Appeals is required, under Section 10 (e) and (f), to decide the case on the merits.[6] The question of the right to have the summary used as part of the record for decision on the merits was being contested in Case No. 7088 and was still open for final determination by the Circuit Court of Appeals.

The stipulation in its entirely means only that the case arising upon the petition of the Independent, No. 7252, should be reviewed upon the same record as that upon which review would be had in the already pending Employer's case, No. 7088. All the motions and objections with respect

[6] The Board frequently has occasion, primarily for the purpose of showing that a certain contention was or was not made, to file with a reviewing court a copy of a brief submitted to the Board or a transcript of oral argument before it. In such cases, the document is certified as a true copy (cf. R. 1009), or even as a physical part of proceedings before the Board (cf. R. 971), but it is not certified as a part of the transcript of record upon which the order of the Board was entered (cf. R. 967).

to the narrative, both before and after the stipulation, were directed toward the Employer's case, No. 7088; thus the Independent's case was viewed as merely ancillary, as in fact it was, to the main proceeding in which the rights of all the parties were being litigated. It may be noted, too, that the Board could not stipulate or certify the narrative as part of the record upon which the order of the Board was made because, in fact, it was not and Section 10 (e) and (f) governs the record that may be certified. The second paragraph of the stipulation, referring to "the printed record to be filed in said cause, No. 7088," is indicative of the subordinate character of the case in which the stipulation was made and shows that, rather than settling the rights of the parties in the main proceeding, the stipulation was dependent upon the determination in the Employer's case as to what should constitute an appropriate record for decision on the merits.

The suggestion that the stipulation was intended to waive the Board's objections to the narrative assumes that the parties sought to accomplish this important result by the obscure device of a stipulation purporting to apply only to Case No. 7252 (see R. 1051). It is scarcely credible that the parties, had they intended a complete settlement of the narrative controversy, would have left its effect upon Case No. 7088 solely to implications arising from the consolidation clause at the end of the document (see R. 1051).

The Employer (Br. 8) also advances an estoppel argument. There is no claim here that any item of expense was incurred in reliance upon the stipulation.[6] But the Employer urges that, in reliance upon the Board's failure to move to vacate the court's order of January 18 making the narrative part of the record upon review (p. 3, *supra*), it expended over $2,000 for printing. The order of January 18 was entered upon the insistence of the Employer (R. 1027–1029) over the strenuous objections of the Board (R. 1030–1032). The Board had fully presented its position, at that time, but had been overruled by the order of January 18. The Board, plainly, was under no further obligation to move at once to vacate. Rather, the Employer took the risk of proceeding in accordance with an order which it had obtained over objections and which it knew the Board would probably seek to have overruled or reversed as erroneous.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
National Labor Relations Board.

DECEMBER 1940.

[6] The printed record bears the Clerk's stamp as having been filed on March 15, 1940, the very day the stipulation was filed, one day before the order thereon, and only two or three days after counsel for the Independent had received the stipulation executed by the Board.

APPENDIX

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 7252

INDEPENDENT UNION OF GEAR WORKERS, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND FOOTE BROS. GEAR AND MACHINE CORPORATION, A CORPORATION, RESPONDENT

STIPULATION

It is hereby stipulated and agreed between the parties hereto by their respective attorneys of record that:

1. The record as certified to this Court by the National Labor Relations Board in the case of Foote Bros. Gear and Machine Corporation, a corporation, petitioner, vs. National Labor Relations Board, respondent, No. 7088, and the summary thereof shall stand as the record of the proceedings before said Board in this case.

2. The printed record to be filed in said cause, No. 7088, shall stand as the printed record in this cause, and an order may be entered in this cause providing that the Clerk of this Court take no action under Rule 14 of this Court in re Printing of the record herein.

It is further stipulated and agreed that said causes, Nos. 7088 and 7252, may be consolidated for purpose of argument.

BENJ. WHAM,
EDWIN W. BURCH,
Attorneys for Petitioner.
ROBERT WATTS,
Associate General Counsel,
National Labor Relations Board.
WINSTON, STRAWN & SHAW,
Attorneys for Respondent,
Foote Bros. Gear and Machine Corporation, a corporation.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

Nos. 547, 548

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FOOTE BROTHERS GEAR & MACHINE CORPORATION.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INDEPENDENT UNION OF GEAR WORKERS.

ANSWER TO PETITIONS FOR WRITS OF CERTIORARI AND OPPOSITION TO MOTION TO REVERSE WITHOUT ORAL ARGUMENT.

SILAS H. STRAWN,
GRIER D. PATTERSON,
GEORGE B. CHRISTENSEN,
Attorneys for Respondent Foote Bros. Gear & Machine Corporation.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

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NATIONAL LABOR RELATIONS BOARD,
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vs.

INDEPENDENT UNION OF GEAR WORKERS.

ANSWER TO PETITIONS FOR WRITS OF CERTIORARI AND OPPOSITION TO MOTION TO REVERSE WITHOUT ORAL ARGUMENT.

STATEMENT.

The Board's application seems to be for writs of certiorari and, in the event the writs are granted, then that the causes be considered and reversed without oral argument. The motion as to what action should be taken if the writs should be granted is, of course, premature. Our position is that the writs of certiorari should

be denied, but if granted then the cause should follow the usual course of full briefs and oral argument. We submit that there would be no authority warranting the novel procedure which the Board suggests of granting certiorari and then finally determining the case in this court on nothing more than a petition for certiorari and answers thereto without briefs in full and without oral argument.

We address ourselves to the petition for certiorari:

Without even claiming that the Circuit Court of Appeals has decided a question which merits review for any of the reasons enumerated in Rule 38 (5) of this Court, the National Labor Relations Board has requested the Court to review and reverse, without oral argument, a decision of the Circuit Court of Appeals for the Seventh Circuit.[1]

Questions Presented.

The petition for certiorari is based upon two grounds:

(1) It is claimed that although the Circuit Court of Appeals had before it the full and complete record of the National Labor Relations Board, and although it entered an order (R. 1019) allowing the Board to print that record *in haec verba* in full if it wished, nevertheless the Court's decision may be cast aside as *nullo bono* simply because it did not require the petitioner for review to print the entire record verbatim. In the Circuit Court of Appeals the Board did not avail itself of its broad printing privilege. It printed, as an appendix to its

[1] *Printing of Record on this Petition:* Believing, as we do, that it was the intent of Congress that the National Labor Relations Act, through administrative procedure, furnish a prompt, inexpensive and effective settlement of labor disputes leading to interruptions of interstate commerce, we do not oppose the Board's motion to dispense with printing of the question and answer record in this Court. Actually the record has been fully made up and no further printing is required.

brief, only a portion of the pleadings. Employer printed the complete pleadings and printed all of the evidence in narrative form except where questions and answers were required in order not to disturb the sense of the testimony.

(2) It is asserted that the Board's findings, which were analyzed and discarded by the Circuit Court of Appeals, nevertheless were supported by substantial evidence. In support of this assertion, the petition for certiorari adopts the improbable and discredited claims of two members of the National Labor Relations Board rather than attempting a genuine analysis of the record to show that those conclusions were buttressed by evidence.

REASONS FOR DENIAL OF THE WRIT.

I.

THE NATIONAL LABOR RELATIONS ACT DOES NOT ATTEMPT TO PRESCRIBE THE DETAILS OF COURT PROCEDURE UPON REVIEW. THE ACT REQUIRES THE COURT TO HAVE BEFORE IT, AND BASE ITS DECISION UPON, THE FULL RECORD UPON WHICH THE BOARD ACTED. BUT THE ACT LEAVES IT TO THE COURT TO DETERMINE HOW MUCH, IF ANY, OF THAT RECORD NEED BE PRINTED AND IN WHAT MANNER THE PRINTING SHALL BE ORDERED.

If the members of the Congress who passed the Wagner Act were to be told that they had passed a law requiring an employer who desired a review of a Labor Board ruling to print *in extenso* the question and answer transcript of the proceedings before the Board, we believe they would be aghast.

It was the intention of Congress to provide by law for the definite establishment of certain rights of employees; to vest the enforcement of those rights in an administrative tribunal which might proceed for their enforcement with directness, expedition and a minimum of technical obfuscation; further, the spirit of administrative procedure is that the Courts shall review the administrative proceeding with a minimum of technicality and expense.

In this case, in answer to the employer's petition for review, the Board, after motion by the employer (R. 1022), filed a full and complete typewritten transcript of all its proceedings. The Circuit Court of Appeals permitted the employer to print a narrative of the evidence therein contained and told the Board that if that

narrative was insufficient it could print such portions of the question and answer transcript as it wished (R. 1019).[2]

This order was so broad that the Board, if it wished, could have printed the entire question and answer transcript of the evidence. It did not do so. The assertion of the Petition for Certiorari (p. 16) that the Court "denied to the Board leave to *substitute* testimony in question and answer form for any part of the narrative" **is directly contrary to the record** (R. 1019). See the Courts order set forth as footnote 2, *supra*. The Board made a *second* motion for leave to print—this was denied, presumably because the Board already had such leave.[3]

Nor did the Board show that the narrative, nor does

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[2] "It is ordered that leave be, and it is hereby, granted: to petitioner (the employer) to print as a part of the record in this Court its prepared narrative of the evidence in lieu of printing the question and answer transcript of the hearings herein; to respondent (the National Labor Relations Board), if it deems the said narrative deficient in any instances, to correct such believed insufficiencies by printing in such instances as an appendix to its brief the questions and answers." (Portions in parenthesis inserted.)

[3] A resumé of the motions and orders on the whole subject is:

Dec. 15, 1939—Motion by employer to print as appendix to its brief or as part of record its prepared narrative with leave to Board to correct any believed insufficiencies by printing questions and answers (R. 1027-1029).

Dec. 26, 1939—Objections of Board to above motion (R. 1030).

Dec. 26, 1939—Reply to objections (R. 1033).

Jan. 18, 1940—Order permitting narrative, set forth in Note 2, *supra* (R. 1019).

March 15, 1940—Stipulation that the record as certified by the Board *"and the summary thereof"* should stand in the consolidated cases (R. 1051).

April 25, 1940—Motion of Board to strike from files entire printed transcript including narrative (R. 1036).

April 25, 1940—Motion of Board that employer print (a) such portions of testimony as it desired court to read in question and answer form or (b) print entire transcript, or (c) granting leave to print entire transcript (R. 1034).

April 26, 1940—Answer to above motions (R. 1045).

May 1, 1940—Order denying motions of April 25 (R. 1048).

it now show that even the portions of the narrative which the Court cited in its opinion, were incorrect. Instead it waited for over three months and then, on the eve of the hearing in the Circuit Court of Appeals, moved (R. 1036) to throw out this entire narrative, printed at considerable expense (R. 1045-6).

The Board now appears to urge in legal effect that the Labor Relations Act permits no court review except by a printing of the *full* question and answer transcript of the Labor Board. The Board asserts (Pet. 13-14) that the Act requires a review by the Circuit Court of Appeals upon the identical, viz., the question and answer, transcript that was before the National Labor Relations Board.

There can be no middle ground. Either the Act is as construed by the Board and requires not only a *filing* for the purpose of jurisdiction, but a *printing*, as the Board asserts, of the entire question and answer transcript; or the Act requires only a filing of the entire transcript and leaves it to the judgment and wisdom of the courts in their respective local practices to require the printing of such portions of the record and in such manner as they see fit. We assert the latter proposition and submit that there is nothing in the Act attempting to control the internal details of federal appellate procedure.

We submit that the jurisdiction of the Circuit Court of Appeals, and of this Court, to review the Board's proceedings is based upon the original certified transcript filed by the Board; that what is printed or not printed in any particular court is a matter for that particular court to determine within its own rules and discretion—it is not a jurisdictional matter.

As a matter of actual fact apart from legal theory, the Board has never contended and, as we understand it,

does not now contend, that we were required to *print* the *entire* question and answer transcript. Once the tacit admission there involved is made, it destroys the whole theory that the Act requires a *printing* of the full question and answer transcript in the Circuit Court of Appeals. It admits that it is within the discretion of the reviewing court to require only the printing of such portions, and in such manner, as the reviewing court believes convenient for its analysis of the issues.

The Board itself, in its motion of April 25, 1940 (R. 1034) in the Circuit Court of Appeals, asked as its first request only that the employer print "such *portions* of said transcript, including such portions of the testimony in question and answer form, as they desire the Court to read," thereby admitting that there was no statutory requirement of the Congress that the entire question and answer transcript or any particular portion thereof be printed.

This particular case presented a particular problem, viz., it was appealed to the Circuit Court of Appeals for the Seventh Circuit before the adoption of that Court's present rules, which require a printing in question and answer form of certain portions of a transcript. The Court dealt with it as a case standing on its own feet. Because the employer had prepared a narrative of the evidence in the form commonly used in the Seventh Circuit before the adoption of the present rules, it permitted the filing and use of such narrative. But, in its order of January 18, 1940 (Tr. 1019) the Circuit Court of Appeals was careful to preserve to the Board the right to print each and every, in fact the entire, question and answer transcript if it believed necessary.

The Board never printed a thing but certain formal pleadings in the Circuit Court of Appeals. On the con-

trary, *it stipulated that the record to be prepared under the order just referred to "and the summary thereof"* should be used in both the consolidated cases (R. 1051).

And now, without showing that the narrative which was presented was either inaccurate or insufficient; without availing itself of its opportunity to print any or all of the evidence in the Circuit Court of Appeals; without showing that the portions of the narrative which the Circuit Court of Appeals referred to in its opinion were inaccurate; without ever moving to vacate the Circuit Court of Appeals order allowing a narrative but on the contrary permitting the employer to expend over $2000 in reliance thereon; without asking relief from its stipulation to use this "summary"; the Board asks this Court to require the process of review to start over again. If that is within the spirit of administrative law or within the intent of the Wagner Act, we are greatly mistaken. Further, we assert that the Board is estopped by its own conduct.

Nor will the Board's assertions that this case establishes a precedent for any other case avail it. The rules of the Circuit Court of Appeals for the Seventh Circuit have been changed since this case was filed. The narrative had been prepared under the old practice (R. 1027-1029). Procedurally, this case stands on its own feet. Nor can any other case stand on those feet.

The hollowness and insincerity of the Board's complaints about the narrative system is apparent by contrasting the Board's own internal procedure with its contentions in Court. It must never be forgotten that the Board itself is under the statutory mandate of acting only "upon all the testimony taken" (Sec. 10 c). But within the confines of its own quarters the Board does not insist that all the evidence be presented to it either in question and answer or narrative form.

We set forth in the margin[4] the system used by the Board as testified to by Mr. Abraham J. Harris, a supervisor in the Review Section of the Board (Verbatim Record of Proceedings of House Committee Investigating Labor Board, Vol. II, p. 265).

Thus the Board acts on the strength of the analysis and summary of the testimony made by others and defends its right so to do,[5] yet objects to the court using, not "analyzed" or "organized" statements of the evidence, but *all the testimony*, only in narrative, rather than question and answer form. Yet the requirement of the Act

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[4] "It would be a physical impossibility for the members of the National Labor Relations Board, or for the members of any board or commission, to examine personally every page of all this testimony, and every exhibit, and to analyze it personally, and as in every administrative agency, the work of reviewing this material has been turned over to a Review Section. The Review Section serves the function of enabling the Board to do its work so far as decision making is concerned. A review attorney reads the transcript, examines the exhibits, he *considers* the matter, *analyzes* it and is able to present to the Board, as the *result of his work, a statement of what the evidence is*, and he is able to present it to the Board in *an organized* form.

"Now, every one who has had to do with the trial of a case knows that the trial of a case is not put in always in an orderly way. One witness gets on the stand and tells parts of the story, the next witness tells other parts of the story. They don't get on the stand and tell one continuous story, and when the case is presented to the Board, the Board is enabled to see the case as a whole, is able to see the relationship between what one witness said and what another witness said, *without the necessity of reading what these witnesses have said in an unorganized fashion.*"

[5] Contrast the Board's present demand that this court read the complete question and answer transcript with its successful defense, in *Inland Steel Co.* v. *N. L. R. B.*, 105 F. (2d) 246, of its own practice not to do so. Contrast also with the Board's contentions in *N. L. R. B.* v. *Cherry Cotton Mills*, 98 F. (2d) 444, 447 ("admission in argument that the Board has made use of a Review Division"). See also *N. L. R. B.* v. *Biles-Coleman L. Co.*, 98 F. (2d) 16, 17.

For further amplification of the Board's system of relying on oral and written summaries of evidence see testimony given by members of the Review Division appearing in Verbatim Record of Proceedings of House Committee Investigating Labor Board, Vol. I, pp. 382-3, 437; Vol. II, pp. 234-5, 273, 298-9, 335.

(Sec. 10 c) is that the Board, as much as the courts, act "upon all the testimony taken."

We do not believe that it is material academically to examine the merits of the question and answer and narrative forms of record. But if it be asserted that there is no merit in the narrative form of review, we call attention to old *Rule 8 of this Court which forbade any other form of printed transcript* than the narrative form, and present Rule 8 which authorizes it.

II.

THE FINDINGS OF THE BOARD WERE NOT BASED ON SUBSTANTIAL EVIDENCE.

As Point II of its reasons for review, the Board asserts that the Board's "subsidiary" findings are based upon substantial and, in considerable part, uncontradicted evidence. With that statement we disagree most emphatically.

The petition for certiorari asserts that the majority of the Circuit Court of Appeals for the Seventh Circuit has continued to apply the "technique of review" described in the Board's petition in the *Link Belt* cases. We have not had the privilege of seeing the Board's petition for certiorari in the *Link Belt* cases, and therefore are under a handicap in answering this obscure argument.

The fact is that the petition for certiorari is based upon verbatim acceptance of the incongruous findings of the Board. The effect is of saying to this Court, the Board found so and so, while the Court found thus and thus. No independent analysis of the record is attempted.

We respectfully submit that the process of certiorari is not open to those who assert merely that the finding of a court is contrary to that of an administrative agency, and therefore presumptively must be incorrect. Unless the

petition for certiorari by page and record can presumptively demonstrate that the findings of the Court are erroneous, and further that the findings of the Board were supported by substantial evidence, it should not be allowed. Otherwise, every case could be reviewed in this Court. It will not do to cite merely the conclusions, correct or incorrect, of the administrative agency. The statement of those conclusions begs the question, which is, were those conclusions supported by substantial evidence?

It is a notorious fact that this particular agency, the National Labor Relations Board, discredited by Congress and the Smith Committee, and none of whose members the President has seen fit, on their records, to reappoint, has been unfair in its fact finding policy. We respectfully submit that it does not lie in the mouth of such an agency to claim this Court's powers of extraordinary review by merely citing the agency's conclusions as opposed to those of a Court whose conscientious members have, over a period of years, enjoyed the confidence of the bar which practices before them.

Manifestly it would be impossible to examine the full record on this petition—nor should it be necessary, inasmuch as the Circuit Court of Appeals decision is presumptively correct. We respectfully submit that a reading of the Court's opinion (R. 1053, *et seq.*) shows that it considered the case carefully, dispassionately and with scrupulous regard for the limitations on its powers of review. Rather than showing that the Court overlooked either evidence or Board theories its demonstrates exactly the contrary.

As examples we touch below on five topics to demonstrate that the Record is quite different from the Board's decision of which the Petition is but a substantial paraphrase:

1. *Dissolution of Old Plan:* The petition for certiorari would make it appear that because the dissolution of the

Old Plan was not accomplished by plant-wide bulletins that it was kept more or less secret. On the contrary, the evidence showed without dispute that the men knew the Old Plan "was out" (R. 277); "was illegal" (R. 463); no more meetings because "it isn't legal" (R. 465). There is not a shred of evidence that the men (highly skilled, intelligent machinists) did not understand exactly their position and their rights.

2. *Solicitation for memberships:* The Board found that the Independent "drive" was "unconcealed and with full knowledge" of employer (R. 934). The Board wholly ignored the solicitation on company time by competing organizations. Nevertheless it is agreed that no inference of company support of any particular organization is involved where all trespass alike on the employers' time (R. 500. Cf. *Matter of American Smelting & Refining Co.*, 7 N. L. R. B. 735, 740). The Court found that "the S. T. B. A., the Amalgamated, and the Independent, all solicited * * * during working hours * * *. The foremen knew that this was going on, and, upon orders from the management, tried to stop soliciting * * * regardless of the organization concerned" (R. 1061-2). What was done on company time was done furtively (R. 278-9, 285, 286, 419, 487, 488, 492, 494). Not one instance was shown where membership in the Independent was solicited in the presence of a foreman. The A. F. of L. and C. I. O. supporters campaigned in the office (R. 232, 235, 316, 427, 440, 444, 448, 449, 450, 457, 467); the C. I. O. adherents did the same in the shop (R. 437, 438, 499, 501, 503). Foreman Schuessler found an Independent solicitor out of his department; he chased him out (R. 487); he treated a C. I. O. solicitor the same way (R. 487-8).

3. *The "systematic" questioning re S. T. B. A.:* Actually involved but five instances, all fully narrated in the court's opinion (R. 1062). In not one of the instances did the Board find that anything hostile to a union was said. (Note that although the Board recited (R. 930) both Rakowski's

and Fowler's version of their talk it refused to make a finding thereon.) In not one of the instances did those questioned disclose any confidential information and in no case was the matter pressed further (R. 478). All continued their memberships and activities unaffected by the questioning—the questioning was proved *as a fact* not to have interfered with them in the slightest; nor with anyone else because they didn't tell about it (R. 294, 478). Nevertheless the Board stated that this "attempt to elicit information * * * *necessarily* would intimidate" (R. 930). That is a *conclusion or opinion* rather than a finding of fact, and as such it is directly contrary to the undisputed evidence that no one was, in fact, intimidated. (Cf. *N. L. R. B.* v. *Express Publishing Co.*, C. C. A. 5, 111 F. (2d) 588, 590.)

4. *The "Refusal" to bargain with S. T. B. A.:* Actually not in issue because not alleged. The complaint alleged only a refusal to bargain with the U. O. P. W. (See Intermediate Report, R. 789) of which there was not even a claim of proof. But the record shows without dispute employer prepared and presented extensive written counter-proposals to the S. T. B. A. (Bd. Ex. 10, R. 641). When the independent came into picture, employer suggested S. T. B. A. get "classification" (as to bargaining units) order from Board (R. 141, 509, 576) and proposed to continue negotiations with it if it got such a "classification" order (R. 576).

5. *The Asserted "Hasty" Recognition of Independent:* The Board and the Petition for Certiorari seek to create the impression that the employer "hastily" recognized the Independent but delayed the S. T. B. A. The fact is that when the S. T. B. A. approached employer it came in with an extensive contract containing sweeping terms —it was the type of document that cannot be entered into overnight. As a matter of fact bargaining on the Independent's contract took over two weeks. But when the

Independent came in for recognition it came in on the single, naked question of recognition—a matter on which the law has left the employer no discretion and no right to bargain. Even so the Independent was not recognized until it had indisputably proved its majority and until the president of the company had obtained consents from a majority of his directors. And then the recognition agreement was carefully drawn to include the proviso from Section 9 (a) of that Act that "any individual employee or group of employees shall have the right at any time to present grievances" (Bd. Ex. 13, R. 509, 518). That was not the act of an employer trying to force its men into an organization.

Additional Reasons Why Writ Should Be Denied.

1. The Board's decision is improper in form, inasmuch as it does not contain clear-cut findings of fact.

2. The charges upon which the Board proceeded failed to comply with the Board's rules, hence the complaints were beyond the Board's jurisdiction.

3. The Board is barred by delay and laches.

4. The complaint alleged that employer failed to bargain with the U. O. P. W.—the Board's order was based on findings of failure to bargain with the S. T. B. A.

5. The Board had no jurisdiction to order refund of check-offed dues.

6. The Board, at the time in question, having failed to provide by rules any system whereby an employer could invoke its services to determine bargaining units cannot complain of the employer's selection of a bargaining unit so long as reasonably sound, even though different from the bargaining structure subsequently determined by the Board.

III.

THE BOARD'S MOTIONS.

Together with its petition for certiorari the Board asks that:

(a) That in the event certiorari be granted that the Court determine, apparently, the entire procedural merits of the case, without oral argument: To this unusual request we most emphatically object.

(b) The Board asks to dispense with the printing of the question and answer transcript: In this we concur. The record should be as it now stands. However, if the Board wants the Court to consider the full question and answer transcript and the Court feels it should undertake that task, it necessarily must be printed in order to furnish sufficient copies.

CONCLUSION.

We respectfully request that certiorari be denied.

Respectfully submitted,

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Foote Bros. Gear & Machine Corporation.

November 20, 1940.

No. 547. NATIONAL LABOR RELATIONS BOARD *v.* FOOTE BROTHERS GEAR & MACHINE CORP.; and

No. 548. SAME *v.* INDEPENDENT UNION OF GEAR WORKERS. On petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. December 9, 1940. *Per Curiam:* The petition for writs of certiorari is granted. The motion to reverse is also granted, the judgments are reversed, and the causes are remanded to the Circuit Court of Appeals with directions to determine the questions presented upon the record as certified by the National Labor Relations Board

pursuant to § 10 (e) of the National Labor Relations Act. *Solicitor General Biddle* and *Mr. Robert B. Watts* for petitioner. *Mr. Silas H. Strawn* for respondent in No. 547. *Mr. Benjamin Wham* for respondent in No. 548. Reported below: 114 F. 2d 611.